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No. 85-952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

GRASON ELECTRIC COMPANY, et al.,
Petitioners,

v.

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. KEITH MCKEAG*
DOWNEY, BRAND, SEYMOUR & ROHWER
555 Capitol Mall, Suite 1050
Sacramento, CA 95814
(916) 441-0131

RONALD F. LIPP
38999 Highway 128
Cloverdale, CA 95425

DAVID S. KAPLAN
6201 S Street
Sacramento, CA 95825-1830

Counsel for Respondent Sacramento Municipal Utility District

*Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Are a municipal utility's actions in distributing electricity to its customers through its own distribution facilities and in allowing its customers to amortize the cost of installation and maintenance of street and outdoor lighting, all pursuant to state statutory authorization, immune from application of the antitrust laws under the state action doctrine?

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STATEMENT OF THE CASE

A. The Parties.

Petitioners are thirteen electrical contractors who do business in and around Sacramento, California. (571 F.Supp. at 1506; A26).[1] [2]

[1] In addition to the rulings which form the basis of this proceeding, the District Court also issued an opinion which set out the contentions of the parties and made factual determinations about the nature and scope of SMUD's activites. This Order is reported at 571 F.Supp. 1504 (E.D. Ca. 1983) and is included in the Appendix to the Petition herein at pages A26 through A72. This statement of the case will when possible make reference of Judge Karlton's Order, rather than the voluminous source documents already analyzed by the District Court.

[2] Throughout this Brief, all citations to "A —" refer to the Appendix to the Petition herein.

Respondent Sacramento Municipal Utility District (hereinafter "SMUD") is a public entity created pursuant to state law and is virtually the exclusive supplier of retail electric energy in a 757 square mile service area which includes the City of Sacramento and adjacent territory. (571 F.Supp. at 1508; A30-31).

SMUD is governed by a Board of Directors which is authorized by state statute to make rules and and set rates and charges. (571 F.Supp. at 1509; A31). The nature and extent of SMUD's statutory authorization will be examined in detail shortly.

B. The Activities of Which Petitioners Complain.

SMUD distributes electricity to single family dwellings, multi-family residences, commercial developments (including shopping centers), and industrial facilities through SMUD-owned and maintained lines. In each case, SMUD's rules determine the point on the customer's property where responsibility for installation and maintenance of electrical facilities shifts from SMUD to its customer. (571 F.Supp. at 1509-10; A34). Petitioners contend that SMUD's system should stop at the outer property line of the property for which new electrical service is required. In the case of multi-user developments, such as residential subdivisions, the "outer property line" would be the outer boundary of the development, not the property line of each lot. From that point on, petitioners contend, the system should be installed and maintained by the customer, using the services of electrical contractors such as petitioners. (571 F.Supp. at 1509-1510; A34). In petitioners' view, SMUD has violated the antitrust laws by requiring instead that customers make use of SMUD's system. (571 F.Supp. at 1510; A34).

SMUD's rules also authorize SMUD to provide its customers with street lighting systems and other outdoor lighting. As to street lighting, a customer has two possibilities. The customer may choose to have SMUD install and maintain a SMUD-owned system, paying a flat charge for the system each month, or the customer may choose to install and maintain his own system at his own expense and pay SMUD at a different, lower rate for the electricity used each month. (571 F.Supp. at 1510-11, A35-36). When a customer chooses the first method, SMUD's installation

costs are amortized, and both those costs and SMUD's maintenance costs are included in the flat monthly charge. Petitioners contend that SMUD's use of this practice places them at a competitive disadvantage, since petitioners do not permit their customers to amortize installation costs in that manner. (571 F.Supp. at 1528; A68-69).

As to outdoor lighting, SMUD's rules authorize it to offer customers outdoor security lighting by way of SMUD-owned and maintained lights. Again, SMUD makes no initial charge for the installation, but charges a flat monthly rate for the service (571 F.Supp. at 1510-11; A35-36). As with street lighting, petitioners contend that SMUD's amortization practices place them at a competitive disadvantage in offering privately constructed outdoor security lighting. (571 F.Supp. at 1528; A68-69). Petitioners also complain that they are not allowed to install outdoor security lights on SMUD's poles, although the Court specifically noted the absence of any evidence of a lack of alternative sites on which petitioners could mount security lights. (571 F.Supp. at 1510-11; A36) (571 F.Supp. at 1529-30; A71).

C. SMUD's Constitutional and Statutory Authority.

SMUD was created in 1923 under the authority of the California Municipal District Act. *Sacramento, Municipal Utility District v. Pacific Gas & Electric Co.*, 72 Cal.App.2d 638, 641 (1946).

The Act was a part of a comprehensive set of laws which were adopted, commencing in 1915, pursuant to a 1911 Constitutional reform supplanting competition with regulated monopoly service in providing electricity and other basic services.

In 1937, the Ninth Circuit Court of Appeals had occasion to examine and describe SMUD's formation, purpose and powers in *Pacific Gas & Electric Co. v. Sacramento Municipal Utility District*, 92 F.2d 365 (9th Cir. 1937), *cert. denied*, 303 U.S. 640, 82 L.Ed. 1100, 58 S.Ct. 610 (1938). Except for changes in the size of the district and the numbering system of the statutes, that Court's description of SMUD remains accurate today:

> The district is not coterminous with any county or municipality. Its 650 square miles include the city of Sacramento, a

large part of the county of Sacramento, and a small portion of Placer County. It was organized under the act of May 23, 1921, Cal. Stats. 1921, p. 245, with amendments thereto. Gen. Laws 1931 and Supps. 1933, 1935, Act 6393.

This act provides that a municipal utility district may be organized out of two or more municipalities or out of a municipality and unincorporated territory, by means of resolution and election procedure, which is not necessary to detail here because it is not questioned that the defendant was duly organized and operating. A board of directors, duly elected, is the governing body.

The district is given power to sue and be sued, adopt a seal, take for its purposes property by all lawful means, including eminent domain, and "to acquire, construct, own, operate, control or use, . . . works or parts of works for supplying the inhabitants of said district and municipalities therein, with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the disposition of garbage, sewage, or refuse matter." Section 12, Subdivision 5 of the act, *supra.*

For the execution of its purposes, and upon a vote of two-thirds of its members, a district is authorized to issue bonds to raise funds for carrying out its objects. Section 15.

The district is given authority "to levy and collect, or cause to be levied and collected, taxes for the purpose of carrying on the operations and paying the obligations of the district." Section 12, Subd. 9, General Laws Supp. 1935, p. 1626. (92 F.2d at 366-367).

The Court went on, at page 369, to conclude that:

> " . . . [*A*] *municipal district such as the appellee here is an agency of the government exercising the state's sovereignty in a governmental function* and that to make such exercise of a state's sovereignty it may raise the necessary funds by general taxation." (Emphasis added).

In 1951, the California Legislature adopted the Public Utilities Code (hereafter "the Code"), consolidating and codifying the

various public utility statutes which had been adopted previously. (The provisions of the Code dealing with municipal utility districts, such as SMUD, are found generally at §§ 11501 through 14509. Those provisions particularly relevant to this proceeding are cited in the Ninth Circuit Opinion and are included in the Appendix to the Petition, or are set out verbatim hereafter).

The Code continues undiminished the broad powers sketched by the Court of Appeals in 1937. Thus, with respect to SMUD's underlying authority, Section 12801 (A76) authorizes SMUD to:

> "acquire, construct, own, operate, control, or use . . . works or part of works for supplying the inhabitants of the district . . . with light . . . power, and may do all things necessary or convenient to the full exercise of the powers herein granted."

See also § 12721 (A75) (ancillary authority); § 13091 (A77) (power to borrow money); § 12703 (A78) (eminent domain); § 12892 (A77) (power of taxation), § 13651 et seq. (A78) (annexation).

As to the nature of an electric utility's system for supplying electrical energy, Section 217 of the Code defines "electric plant" as follows:

> " 'Electric plant' includes all real estate fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power."

Government of SMUD is vested in its Board of Directors, which is a legislative body, setting policy through a process of public meetings and hearings and Section 11885 provides:

> "The board shall supervise and regulate any utility and facility owned and operated by the district, including the fixing of rates, rentals, charges, and classifications, and the making and enforcement of rules, regulations, contracts, practices and schedules, for or in connection with any ser-

vices, product or commodity owned or controlled by the district."

Section 12809 directs that:

"The rates and charges for commodities or services furnished by a district shall be fixed by the board. As far as possible utilities shall be self-supporting but the board is not required to fix a rate which in its opinion is unnecessarily high, nor to cover by rates large expenditures and the interest thereon required for future needs and developments."

In short, SMUD generates, transmits, and distributes electricity through its own electric plant acquired, installed, and maintained with funds generated by revenues and loans; all pursuant to a comprehensive statutory and constitutional framework which grants the authority to do all things necessary and convenient for supplying its inhabitants with light and power.

D. The Rulings Below.

The District Court, Judge Ramirez, held that SMUD was not entitled to state action immunity because SMUD's statutory authority was permissive rather than compulsory, because it was not permissable to show state policy to displace competition by inference, and because there was no active state supervision of SMUD's activities. 526 F.Supp. 276 (E.D. Ca. 1981); A15-25. Subsequently, on Judge Ramirez's recusal, Judge Karlton, ruling from the bench, granted summary judgment for petitioners, relying on Judge Ramirez' decision as the law of the case. A10-12. Judge Karlton certified the question for interlocutory appeal (A13-14) and the Ninth Circuit Court of Appeals, in reliance on the intervening decision of this Court in *Town of Hallie v. City of Eau Claire*,____U.S.____, 85 L.Ed.2d 24, 105 S.Ct. 1713 (1985), reversed, ordering dismissal of the action on the basis of state action immunity. 770 F.2d 833 (9th Cir. 1985); A1-9.

SUMMARY OF ARGUMENT

The decision below of the Ninth Circuit Court of Appeals is controlled by and in perfect harmony with the decisions of this Court which bear on the application of the state action doctrine to

municipalities. The decision below also is consonant with the decisions in other Circuits which have considered the issue and with other Ninth Circuit decisions as to which petitions for certiorari have been denied.

The decision below is an explicit and faithful application of this Court's ruling in *Town of Hallie v. City of Eau Claire*,____U.S.____, 85 L.Ed.2d 24, 105 S.Ct. 1713 (1985). Relying on that decision, the Court below found that SMUD's actions were undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and that active state supervision of SMUD's actions was not required in view of SMUD's status as a municipality.

The factual allegations and the theory of liability in *Town of Hallie* were remarkably analogous to the case at bar. The salient differences between *Town of Hallie* and the instant case are two: the statutory authority here is substantially more comprehensive and explicit and here a record exists of legislative contemplation of the very activities in dispute to support the conclusion that SMUD's conduct is a true realization of state policy.

The decision below is also in accord with this Court's earlier decisions in *Community Communications Company, Inc. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978); and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110 (1976).

The only activities at issue in this case are SMUD's practices of providing power and light through facilities owned and operated by it. Notwithstanding the rhetorical flourishes in the Petition, this suit has never involved claims that SMUD is actually or potentially engaged in the sale of toasters, typewriters, lightbulbs, bottled water, flashlight batteries, or any of the other products listed by petitioners.

Every issue presented by this case has already been settled by this Court. The rules of law announced by this Court in *Town of Hallie* provide clear and coherent standards for the conduct of municipal activities. The principles which have evolved in this Court's state action decisions neither eviscerate the antitrust laws

nor oppose the present-day trend of deregulation. The Court's doctrine recognizes the fundamental importance of federalism in our legal system and serves the larger purpose of decentralization which underlies deregulation. To repudiate the reliance of the Court below on *Town of Hallie* in a case which so closely parallels it would do violence to all those values.

ARGUMENT

I

THE DECISION BELOW IS IN FULL ACCORD WITH PREVAILING DOCTRINE REGARDING APPLICATION OF THE STATE ACTION DOCTRINE TO MUNICIPALITIES

A. The Decision Below Is An Explicit and Faithful Application of *Town of Hallie*

SMUD is a municipal utility district, a governmental agency, whose sole function is to provide light and power to inhabitants of the Sacramento area. All of the acts complained of are elements of that service. Specifically, petitioners complain that SMUD distributes electricity to its customers at points on the customer's property, rather than stopping at the outer boundary line of the property, and that SMUD permits its customers, if they wish, to amortize the installation and maintenance cost of street lighting and outdoor lighting.

Petitioners concede that the statutes under which SMUD operates constitute a clear articulation and affirmative expression of state policy to displace competition in the market for "electricity sales". But they contend that no expression of such a state policy exists as to the alleged separate products of "electrical distribution systems on private property" and "street and outdoor lighting." The gist of petitioners' case is that SMUD employs its monopoly in the sale of electricity to monopolize these related "markets". *Grason Electric Co. v. SMUD*, 770 F.2d 833, 835 (9th Cir. 1985); A2.

These circumstances closely parallel *Town of Hallie*. In that case, another municipality was accused of using a monopoly in

sewage treatment to unlawfully monopolize sewage collection and transportation services. In *Town of Hallie*, the plaintiffs argued that the statutes relied on by the municipality did not evidence a state policy to displace competition because those statutes made no express mention of the anticompetitive conduct and because they did not compel the acts complained of. 85 L.Ed. at 31 and 33. So say the petitioners here.

This Court put these arguments to rest, holding that the "clear articulation" requirement is met by statutes which "plainly show that 'the legislature contemplated the action complained of.'" (85 L.Ed.2d at 33) and that "where the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove the challenged practice constitutes state action." (85 L.Ed.2d at 33).

The Ninth Circuit had the benefit of these rulings when it wrote its opinion in the case at bar, analyzing SMUD's constitutional and statutory authority, and held:

> The Court in *Town of Hallie* found sufficiently "clear articulation" where the state statutes "clearly contemplate that a city *may* engage in anticompetitive conduct." Id. (emphasis added). Writing for a unanimous Court, Justice Powell stated that
>
> > [i]t is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. Applying the analysis of *City of Lafayette* [*v. Louisiana Power & Light Co*]., [435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978),] it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate.
>
> * * *
>
> These state statutes appear to represent at least as broad a grant of authority to regulate as those involved in *Town of Hallie*. There, the Court found sufficiently "clear articula-

> tion" in a statutory scheme which authorized the city to provide sewage services. *See* 105 S.Ct. at 1717-19. We recently reaffirmed our view that "[n]arrowly drawn, explicit delegation is not required." *Preferred Communications*, 754 F.2d at 1413. Also, as SMUD points out, this Circuit has applied state action immunity in cases involving less comprehensive regulatory schemes than that which is involved here. *See Golden State Transit*, 726 F.2d 1430 (statute providing for state regulation of taxicabs if cities did not regulate held to provide basis for municipality's immunity); *Spring Ambulance Service*, 745 F.2d 1270 (statute providing that "city may contract for ambulance service to serve the residents of the city as convenience requires" held to evidence sufficiently clear articulation).
>
> Thus, we conclude that the statutes here evidence a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of electrical power and light. *See Town of Hallie*, 195 S.Ct. at 1721. These statutes "clearly contemplate that [SMUD] may engage in anticompetitive conduct" such as that alleged by the plaintiffs; it is apparent "that anticompetitive effects logically would result from this broad authority to regulate." Id. at 1718. (770 F.2d at 836, 838, A5 and 8).

SMUD operates under a constitutional and statutory framework which embodies a comprehensive state policy to displace competition in the provision of light and power.

SMUD has explicit authority to provide power and light (§ 12801, A76) and to set such rates as it will, even rates below cost (§ 12809, A77). It thus has explicit authority for setting street and outdoor lighting rates which permit customers to amortize their costs. As to SMUD's practice of utilizing facilities owned and installed by it to distribute power, there surely is ample contemplation of SMUD's actions in the statutory provisions which authorize it to supply power; to acquire, construct, own, operate, control, and use works; and to do all things necessary or convenient to that end. (§§ 12801, 12721; A75 and 76). Coupled with such broad powers as eminent domain and taxation (§§ 12703, 12893; A77 and 78), it is difficult to believe

that the legislature did not contemplate that SMUD would displace competition in bringing light and power to its customers.

Moreover, the Court of Appeals in the case at bar did not have to rely solely on inference to determine whether the activities complained of were contemplated by the legislature. SMUD was able to present evidence of attempts over the last twenty years by electrical contractors, including some of the petitioners, to amend the statutes involved here. Those proposed amendments, which were consistently rejected by the legislature, would have reduced the authority granted to SMUD in the very areas involved in this litigation and would have directed that the construction of outdoor lighting and underground distribution systems be performed by private contractors. As the Ninth Circuit stated:

> While such information is not conclusive, of course, it certainly supports the assertion that the legislature was made aware of and declined to interfere with SMUD's anticompetitive conduct. Despite the failure of these earlier efforts at changing the law, we believe that the legislature, not the courts, remains the proper forum in which to urge revision in SMUD's statutory grant of power. (770 F.2d at 838).

B. The Decision Below is Consonant with *City of Boulder.*

The petitioners contend that the constitutional and statutory authorities relied on by the Court of Appeals to immunize SMUD are neutral insofar as state policy is concerned since that authorization does not expressly name the activities complained of and leaves discretion in SMUD as to how it will distribute electricity and set its rates for light and power.

As a result, it is said, the decision below conflicts with the holding of this Court in *City of Boulder* that a general grant of authority reflecting mere neutrality on the part of the state is insufficent to justify state action immunity.

This precise argument was met and rejected by this Court in *Town of Hallie*. This Court there said:

> The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly

> state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.
>
> Furthermore, requiring such explicit authorization by the State might have deleterious and unnecessary consequences. Justice Stewart's dissent in *City of Lafayette* was concerned that the plurality's opinion would impose this kind of requirement on legislatures, with detrimental side effects upon municipalities' local autonomy and authority to govern themselves. 435 U.S., at 434-435, 55 L.Ed.2d 364, 98 S.Ct. 1123. In fact, this Court has never required the degree of specificity that the Towns insist is necessary. (85 L.Ed.2d at 32, footnote omitted).

Petitioners' real objection is that SMUD is left with a measure of discretion. Thus, petitioners complain:

> "... each of the activities authorized under the statutes relied upon by the Ninth Circuit *could be* carried out in an anticompetitive way, [but] the choice of whether or not to do so is left to SMUD." (Petition, p. 13; emphasis in the original).

But petitioners' dissatisfaction is not with the Court of Appeals' fidelity to *City of Boulder*. Their real quarrel is with this Courts' holding in *Town of Hallie* that:

> [W]here the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary. (85 L.Ed.2d at 33)

The problem in *City of Boulder* was not the presence of discretion in the city, but the absence of contemplation by the legislature—an omission implicit in the broad, amorphous grant of power contained in the home rule provision.

C. The Decision Below is Consonant with *City of Lafayette.*

Petitioners contend that the decision below violates the rule of *City of Lafayette* that cities are not entitled to state action immunity merely by virtue of their status as cities; the city's existence does not make it a mini-sovereign. Petitioners do not say so, but they might well have added the correlative rule of *City of Boulder:* the state may not transform the city into its alter ego by a plenary grant of sovereignty.

On its face, the opinion below does not appear to justify petitioners' objection. The Court of Appeals would not have engaged in a detailed recitation and examination of SMUD's constitutional and statutory authority, nor given weight to the record of repeated legislative refusal to limit that authority, if it believed that immunity flowed from SMUD's municipal status alone. Petitioners' argument appears to be that this process is a sham, that SMUD's statutory authority is so vague and general as to be like the unbounded grant of home rule in *City of Boulder.*

But surely this is not so. The legislation speaks of the construction and operation of physical plant and the setting of rates with respect to a portion of the facilities involved in furnishing power and light, specifically the electrical distribution system and street and outdoor lighting.

If there is any doubt, frame the question in the inverse. Under the immunity rule in *Town of Hallie,* it is unnecessary that a statute expressly describe the precise municipal conduct sought to be protected; to require more than articulation of the general parameters of activity sanctioned by state policy would involve an unrealistic view of the legislative process. How, without requiring an explicit catalog of protected activities, could the legislature be expected to provide a more precise expression of state policy that it has in the case at bar?

Petitioners contend that "the Ninth Circuit has developed its own test for municipal antitrust imminity", one by which "SMUD could engage in virtually any anticompetitive practice in any business if SMUD deemed it to be *convenient.*" (Petition, p. 10; emphasis in the original). Nothing in the opinion below purports to announce such a standard; the Court there adheres to

Town of Hallie in every respect. The real difference between petitioners and the Court of Appeals involves the latter's application of the *law* in *Town of Hallie* to the *facts* of the case at bar. The Court of Appeals properly found a more detailed expression of statutory authority here than in *Town of Hallie*. It was also able to rely on a legislative record far more explicit than any decision of this Court has required, evidence that the legislature had considered the precise conduct of which petitioners complain:

> In the sixties and seventies, the legislature had before it bills which would have allowed private contractors to construct outdoor lighting and underground electrical systems, but in each instance the legislature declined to change the status quo. (770 F.2d at 838; A8)

D. The Decision Below is Consonant with *Cantor*.

Petitioners also object that the decision below offends this Court's decision in *Cantor*. In *Town of Hallie*, this Court noted a fundamental distinction between cases like *Cantor*, involving private defendants, and those like the case at bar:

> *Cantor* and *Goldfarb* concerned private parties—not municipalities claiming the state action exemption. This fact distinguishes those cases because a municipality is an arm of the State. We may presume, absent a showing to the contrary, the the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf. (85 L.Ed.2d at 33, footnotes omitted).

Even without this distinction, petitioners' objections fail. Petitioners make two assertions. First, they say, the Court below "relied entirely on a statutory scheme designed not to *suppress competition* but rather *to prevent monopolistic exploitation* by a natural monopoly electric utility." (Petition, p. 7, emphasis in original). Petitioners offer no authority whatsoever for their assertions of legislative purpose. The Court of Appeals from a reading of the statutes' texts found that they "evidence a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of electrical power and light." 770

F.2d at 838; A8. The plaintiffs have not revealed any hidden wellspring of legislative purpose to contradict the Court's reading of the plain meaning of the texts.

Second, petitioners say the Court below failed to distinguish SMUD's exercise of its 'natural monopoly powers' in the sale of energy and its 'electrical contracting business' in a competitive area of the economy. As with petitioners' prior objection, both halves of this formulation fail because they rest upon unsupported assumptions. SMUD's statutory authority encompasses activities involving the furnishing of light and power. Nothing in the statutes suggests that those statutes embrace only actions which involve the exercise of natural monopoly powers. And nothing submitted by petitioners would justify the Court in defying the plain meaning of the statutes because certain actions apparently sanctioned by the statutes do not satisfy petitioners' economic criteria. The question here is what the state in the exercise of its sovereignty intended to permit of utilities, not what petitioners may believe economics or political science would commend. Similarly, petitioners' assertion that the activities in question in this suit represent a separate business assumes the very question in issue. The Court of Appeals here, like this Court in *Town of Hallie*, determined that the state concluded otherwise. That is a sufficient answer.

E. Petitioners Mischaracterize SMUD's Activities.

A consistent theme runs through petitioners' arguments: the Court below has misapplied state statutes intended to immunize the sale of electricity and extended that immunity to unrelated business conduct. Petitioners assert that SMUD has been given carte blanche to engage in any activity it wishes. Indeed, it appears that SMUD may be in danger of running amok since petitioners at various points suggest that SMUD may now possess blanket immunity to restrain competition in such diverse areas as lightbulbs, bottled water, flashlight batteries, heating systems, automobiles, telephones, and cable television service. See e.g., Petition, p. 17.

The excesses of these assertions no doubt represent hyperbole. Petitioners have never adduced evidence suggesting that SMUD

is an actual or potential competitor in any of these businesses. This case has always been limited to petitioners' claims with respect to electrical distribution systems and street and outdoor lighting systems.

Thus, petitioners' assertion that SMUD is "engaged in the electrical contracting business" (Petition, p. 2) is no more than a characterization of SMUD's construction and operation of distribution and lighting facilities as part of its physical plant. Even as to these activities, petitioners' assertions have never been more than that. SMUD has always maintained that it sells only one product—electricity. SMUD does not sell distribution systems on private property and does not sell street lights or outdoor lights.

In 1983, the District Court had occasion to examine this issue in detail when it ruled on a motion for summary judgment brought by petitioners. At that time, it reached the following conclusions:

> Thus, viewed in the manner prescribed by Rule 56, *the evidence shows that SMUD's network stops in any given instance right at the point that the consumers specific needs dictate the construction of an individualized distribution system.* Put in other terms, SMUD constructs distribution facilities to the extent, and only to the extent, that the consumer has no interest in those facilities independent of the desire to obtain raw electric power or so a jury could reasonably conclude based on the evidence now before the court. Under the appropriate functional analysis it appears, therefore, that the *plaintiffs have not met their burden of showing that "electrical energy systems" are a product distinct from retail electrical energy.* Rather, for purposes of parsing this claim in the instant motion, *the court concludes that SMUD is correct in asserting that it sells only one product—electricity.* Accordingly, the plaintiffs' motion for summary judgment must be denied insofar as it relates to their claim that SMUD used its monopoly power as a lever in a separate market for "electrical distribution systems". (571 F.Supp. at 1527, A66-67, footnotes omitted, emphasis added).

Thus, petitioners have failed to convince both the District Court and the Court of Appeals that SMUD's distribution and lighting activities represent a business separate or distinct from SMUD's sole business of providing electric service.

II

NO RATIONAL BASIS EXISTS FOR GRANTING THIS PETITION

A. No Unsettled Questions Are Presented By This Petition.

In *Town of Hallie*, this Court unanimously held that the actions of a municipality are entitled to state action immunity when those actions are undertaken pursuant to a clear articulation of state policy to supplant competition even where (a) the articulation of state policy does not explicitly describe the specific acts to be immunized, (b) the municipality has discretion whether to engage in those acts, and (c) the municipality's performance of those acts is not actively supervised by the state.

In the decision below, the Court of Appeals expressly applied *Town of Hallie* as to each of these three elements. The Court found that the District Court had employed an erroneous legal standard as to each element, that SMUD satisfied each element, and that SMUD therefore is entitled to state action immunity.

Thus, the Court of Appeals correctly applied settled law to every issue pertinent here. Moreover, the decision of the Court of Appeals in the case at bar is consistent with a large body of appellate decisions regarding the state action immunity of municipalities.

The decision here under attack follows a series of recent Ninth Circuit decisions applying substantially the same standards, several of which were denied certiorari in the wake of *Town of Hallie*. These are *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 85 L.Ed.2d 159, 105 S.Ct. 1865 (1985); *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984), *cert. denied*, ____U.S. ____, 87 L.Ed.2d 634, 105 S.Ct. 3503 (1985); *Deak-Perara Hawaii, Inc. v. Dept. of Transporta-*

tion, 745 F.2d 1281 (9th Cir 1984), *cert. denied,* ____ U.S. ____, 84 L.Ed.2d 820, 105 S.Ct. 1756, (1985); *Preferred Communications v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1985), *cert. granted on other grounds,* No. 85-390 November, 1985; *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.,* 753 F.2d 790 (9th Cir. 1985); *Spring Ambulance Service, Inc. v. City of Rancho Mirage,* 745 F.2d 1270 (9th Cir. 1984); *Catalina Cablevision Assoc. v. City of Tucson,* 745 F.2d 1266 (9th Cir. 1984); *Llewellyn v. Crothers,* 765 F.2d 769 (9th Cir. 1985).

The decisions of other Courts of Appeals are also in substantial agreement. See *City of North Olmstead v. Greater Cleveland Regional Transit Authority,* 722 F.2d 1284 (6th Cir. 1983), *cert. denied,* ____ *U.S.* ____, 81 L.Ed.2d 345, 104 S.Ct. 2387 (1984); *Hybud Equipment Corp. v. City of Akron, Ohio,* 742 F.2d 949 (6th Cir. 1984), *cert. denied,* ____U.S. ____, 85 L.Ed.2d 160, 105 S.Ct. 1866 (1985); *Town of Hallie v. City of Eau Claire,* 700 F.2d 376 (7th Cir. 1983), *affirmed,* ____ U.S. ____, 85 L.Ed.2d 24, 105 S.Ct. 1713 (1985); *Gold Cross Ambulance & Transfer v. City of Kansas City,* 705 F.2d 1005 (8th Cir. 1983), *cert. denied,* ____ U.S. ____, 85 L.Ed.2d 158, 105 S.Ct. 1864 (1985); *Central Iowa Refuse Systems, Inc. v. Des Moines Metro Solid Waste Agency,* 715 F.2d 419 (8th Cir. 1983), *cert. denied,* ____ U.S. ____, 85 L.Ed.2d 158, 105 S.Ct. 1864 (1985); *Pueblo Aircraft Service, Inc. v. City of Pueblo,* 679 F.2d 805 (10th Cir. 1982), *cert. denied,* 459 U.S. 1126, 74 L.Ed.2d 977, 103 S.Ct. 762 (1983).

B. There is No Need to Reopen the Doctrine of *Town of Hallie.*

Finding no comfort in decided doctrine, the petitioners now assert that this is a case of first impression, contending that this Court has not yet considered the application of state action immunity to proprietary activities of municipalities. In support of their contentions, petitioners quote at length from the concurring opinion of the Chief Justice in *City of Lafayette.*

City of Lafayette was a true case of first impression, the first instance in which this Court was called upon to apply state action concepts to municipal actors. This formidable task provoked a

number of opinions by members of the Court (none of them able to carry a majority on all issues), including a thoughtful concurrence by the Chief Justice suggesting that a distinction might be drawn between governmental and proprietary functions of municipalities.

However, in the evolution of this Court's thinking about municipalities and state action since *City of Lafayette*, that distinction has not survived. In *Town of Hallie*, this Court's definitive statement on the subject, Justice Powell, writing for a unanimous Court, repeatedly distinguished between private and municipal actors and between municipalities regulating private conduct and municipalities themselves acting. But nowhere did he suggest that the criteria applicable to municipal actors varies according to whether their activities are proprietary or not. The omission of this distinction cannot be regarded as inadvertent. Early in his opinion, Justice Powell, in reciting the history of the litigation, noted that the rule announced in the Court below dispensed with the supervision requirement where muncipalities were engaged in a "traditional municipal function" (85 L.Ed.2d at 29). In contrast, Justice Powell announced a rule which dispensed with the supervision requirement whenever the *actor* was a municipality, rather than a private party, without reference to the kind of activity involved.

The distinctions which this Court chose to draw and to omit in *Town of Hallie* reflect its view that the nature of the *actor,* not the activity, provides the proper guide to judicial standard setting:

> [A] municipality is an arm of the State. We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.
>
> * * *
>
> Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrange-

> ment. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. (85 L.Ed.2d at 33, 34; footnote omitted; emphasis in original).

Petitioners err: this is not a case of first impression, but an issue well settled.

Even if petitioners were right, they offer no authority that the activities actually in question here—as opposed to those which petitioners speculate Sacramento Municipal Utility District might some day undertake—are proprietary. The decision below relied in part on the Court of Appeals' earlier determination that Sacramento Municipal Utility District is a municipal district performing a *governmental* function. See, *Pacific Gas & Electric Co. v. SMUD,* 92 F.2d 365, 369 (9th Cir. 1937), *cert. denied,* 303 U.S. 640, 82 L.Ed. 1100, 58 S.Ct. 610 (1938), cited at *Grason v. SMUD,* 770 F.2d 833, 838 (9th Cir. 1985); A9.

C. Public Policy and The Interests of Federalism Will Be Served By Denial of The Petition

Petitioners regard the decision below as a miscarriage of justice, a threat to free market activity, and an anachronism in an age of deregulation. Petitioners fear that the Court below has created a jurisprudential philosopher's stone by which SMUD can transform immunity to build and operate electrical distribution facilities and lighting systems into authority to monopolize "typewriters, toasters, and television sets". Petition, p. 20. Looking only at the case actually before this Court, the crux of petitioners' concern is that SMUD now performs some tasks in connection with furnishing electrical service which petitioners believe might be performed be electrical contractors absent state action immunity.

But the fundamental consequence of the state action concept is to validate the displacement of competition. Under *Town of Hallie,* municipalities possess discretion to substitute themselves for the marketplace, but only where they can demonstrate that

their conduct conforms to clearly articulated state policy to that effect.

The standards announced in *Town of Hallie* are a distillation of this Court's deliberations since *City of Lafayette*. These standards constitute a clear, coherent, and manageable guide to municipal conduct and antitrust enforcement.

Underlying the state action doctrine is a vital concern for the preservation of federalism. As this Court admonished in its seminal decision in *Parker v. Brown*, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943):

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. (317 U.S. at 351).

Under the standards of *Town of Hallie*, a municipality must still demonstrate that its actions implement state policy; but once that connection is shown, those acts are not subject to attack by competing values. This hard-won balance between sovereign immunity and antitrust enforcement should not lightly be disturbed.

The Court below avowedly adhered to the standards of *Town of Hallie*. It reviewed the record de novo and found ample basis for conferring immunity on SMUD.

The impact of the decision below, as well as the substantial body of like appellate decisions cited earlier, is not inconsistent with the present day impetus toward deregulation. Nor does the state action doctrine necessarily threaten free market values. The underlying motivation of state action is the federalist value of decentralization; to place decision making on a more local level, not to determine what the substance of perticular decisions should be.

CONCLUSION

The decision below represents reasonable application of settled law under the state action doctrine. Accordingly, Respondent respectfully prays that the Petition for Writ of Certiorari in this action be denied.

DATED: December 31, 1985

Respectfully submitted,

J. KEITH MCKEAG
DOWNEY, BRAND, SEYMOUR
& ROHWER

RONALD F. LIPP

DAVID S. KAPLAN

By J. KEITH McKEAG
J. Keith McKeag

Counsel for Respondent
Sacramento Municipal
Utility District